

Part III - Administrative, Procedural, and Miscellaneous

Election to Include in Gross Income Gain on Assets held on January 1, 2001

Notice 2002-58

This notice informs taxpayers that the election under § 311(e) of the Taxpayer Relief Act of 1997 (TRA 97), 1997-4 (Vol. 1) C.B. 1, 49-50 (as amended by § 314(c) of P.L. 106-554 and § 414 of P.L. 107-147), to treat certain assets held on January 1, 2001, as having been sold and then reacquired on that date is properly made by following the instructions for Form 4797, Sales of Business Property, or Schedule D, Capital Gains and Losses, for Form 1040, 1120, 1120S, 1065, or 1041. Under appropriate circumstances, the Internal Revenue Service will grant requests to make a late election under § 311(e) of TRA 97 and this notice under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations.

Under § 1(h)(1) of the Internal Revenue Code, gain resulting from the sale or exchange of most capital assets is taxed at a capital gains rate of 20 percent (10 percent for gain otherwise taxed at an ordinary rate of 15 percent or less). Section 1(h)(2)(B) provides that the 20-percent capital gains rate is reduced to 18 percent for qualified 5-year gain resulting from the sale or exchange of property with a holding period beginning after December 31, 2000. Qualified 5-year gain is defined generally by § 1(h)(9) as “the aggregate long-term capital gain from property held for more than 5 years.”

Section 311(e) of TRA 97 allows a noncorporate taxpayer holding a capital asset on January 1, 2001, to elect to treat that asset as having been both sold and reacquired

on that date for an amount equal to its fair market value (a § 311(e) election). If a taxpayer makes a § 311(e) election, the holding period for the elected asset begins after December 31, 2000. This makes the asset eligible for the 18-percent rate if it is later sold after having been held by the taxpayer for more than 5 years from the date of the deemed sale and reacquisition.

A taxpayer makes a § 311(e) election by following the instructions for the appropriate Schedule D or Form 4797. Under these instructions, the taxpayer must report the resulting gain in gross income on the tax return for the tax year that includes the date of the deemed sale and attach a statement to the return stating that the election is being made under § 311(e) of TRA 97 and listing the assets for which the election is being made. The tax return on which the gain is reported must be filed by its due date, including extensions.

Pursuant to § 301.9100-2, taxpayers who timely filed their tax returns without making the § 311(e) election for one or more eligible assets may still make the election by filing an amended return within 6 months of the due date of the original return, excluding extensions. One of the following statements must be written at the top of the amended return: "Election Under Section 311 of the Taxpayer Relief Act of 1997" or "FILED PURSUANT TO § 301.9100-2."

If a taxpayer (i) did not timely file an original return on which a § 311(e) election could have been made, as described above, or (ii) failed to make a § 311(e) election with respect to one or more eligible assets on a timely-filed original return and failed to make the § 311(e) election on an amended return filed within 6 months of the due date of that original return, then the taxpayer may apply for relief under § 301.9100-3, in

accordance with the provisions of Rev. Proc. 2002-1, 2002-1 I.R.B. 1 (or any successor).

The principal author of this notice is Amy Pfalzgraf of the Office of the Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice contact Ms. Pfalzgraf at (202) 622-4950 (not a toll-free call).